APPENDIX A

THE SUPREME COURT OF OHIO

Case No. 2007-2321

[Filed April 9, 2008]

Telxon Corporation et al.	)
	)
v	)
	)
Smart Media of Delaware, Inc., et al.	)
	)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Summit County Court of Appeals; Nos 22098 and 22099)

/s/
THOMAS J MOYER
Chief Justice

APPENDIX B

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
STATE OF OHIO
COUNTY OF SUMMIT

C.A. Nos 22098 & 22099

[Filed November 5, 2007]

TELXON CORPORATION, et al.	)
Appellants	)
	)
v.	)
	)
SMART MEDIA OF DELAWARE, INC., et al.	)
Appellees	)
	)

JOURNAL ENTRY

Appellees Smart Media and Dupre have moved this court, pursuant to Civ.R. 60(B), to vacate the decision and journal entry, which was journalized on September 25, 2005 and which reversed a trial court judgment and damage award. The Appellants have responded in opposition. Appellee Dupre also has moved for leave to file an untimely motion for reconsideration. Upon consideration, for the reasons set forth in the attached opinion, both motions are denied.

/s/ _____
Judge

/s/ _____
Judge

A brief recitation of the procedural facts is in order. During 1998, Appellant Telxon filed suit against Appellee Smart Media, seeking a declaration that there was no binding agreement between the two companies. Smart Media joined other defendants, including Appellee Dupre, and all of the defendants filed counterclaims. They alleged various counterclaims, including breach of contract, fraud, and interference with a business relationship. Appellant Symbol Technologies was later joined as a defendant to the counterclaims.

The case eventually proceeded to a jury trial, which culminated in a judgment against Telxon and Symbol and in favor of the counterclaimants, with a total damage award in excess of $218 million. Telxon and Symbol appealed and this court reversed the judgment on the counterclaims. This court held that the judgment should be reversed because, among other reasons, there was not enough evidence to support any of the counterclaims and Telxon and Symbol should have been granted directed verdicts. Smart Media and Dupre appealed to the Ohio Supreme Court, but the Court declined to accept jurisdiction.

On January 9, 2007, Appellee Smart Media filed a motion with this court to vacate the judgment pursuant to Civ.R. 60(B). Appellee Dupre later joined in that motion. The motions of each Appellee urged

that this court vacate its decision in this case due to the "unacceptable appearance of impropriety and possible bias." They alleged that, unbeknownst to either of the Appellees at the time, Robert Meyerson, who had been the CEO of Telxon and had a financial stake in the outcome of this case, had strong political ties to the Summit County Republican Party and directly to Judge William G. Batchelder, the author of the opinion. Appellees asserted that over a period of years, Meyerson had made substantial financial contributions to Judge Batchelder and his political party both locally and statewide. In addition to Judge Batchelder's financial ties to Meyerson, Appellees alleged other surrounding factors that tended to create an appearance of impropriety, which included: (1) the opinion itself, in which only one of the other two panel judges concurred, which was unnecessarily lengthy and written in a tone that does not appear to be unbiased; and (2) the fact that Judge Batchelder left the bench shortly after the decision to pursue an elected position in the legislative branch of government. Given the additional facts that the trial court's damage judgment for Smart Media and Dupre had been historically large and that this court reversed the judgment and entered final judgment for the appellants, Smart Media and Dupre contend that the totality of the circumstances of this case conveys a strong appearance of impropriety.

All of the sitting judges of the Ninth District Court of Appeals have recused themselves and the matter is now before this panel of visiting judges pursuant to assignment by the Chief Justice of the Ohio Supreme Court.

THE SPECIFIC ALLEGATIONS

According to the allegations of the Appellees, Robert F. Meyerson, a one-time Chairman and CEO of Telxon, held an ownership interest through himself and/or his "affiliates" in the amount of 7.6 million dollars as of mid-January 2000. Appellees allege that Meyerson was not only a key witness in the case but also Judge Batchelder's largest and longest-standing political contributor. At a time when Meyerson is said to have known about the pending litigation—as early as the spring of 2000—Meyerson donated $50,000 to the Republican Party of Summit County. A battery of additional donations in the fall of 2000 is listed in the respective chronological amounts of $50,000, $110,000, $100,000, and $25,000, so that, all in all, Meyerson donated $335,000 to the county party during calendar year 2000. (In October 2000 the party itself contributed $20,000 to Judge Batchelder's judicial campaign.) During the year 2001, Meyerson donated an additional $202,500 to the county party. And in 2003, Meyerson donated $55,000 to the county party, earmarking $50,000 for the "Judicial Fund." Also, for his 1996 campaign for the Ohio House of Representatives—prior to his elevation to the bench—Judge Batchelder allegedly received $15,000 from Meyerson, visited Meyerson at Meyerson's home to solicit the contribution and later entertained Meyerson at his (Batchelder's) home following receipt of the political contribution. That sum—$15,000—is described as nearly one-third of the total funds raised for Batchelder's Ohio House campaign for that election cycle.

PROCEDURAL ISSUES AND MECHANISMS

We must initially address whether Telxon and Dupre have a procedural avenue to seek their requested relief. Telxon moved to vacate judgment pursuant to Civ.R. 60(B) and Dupre joined in that motion. Although Civ.R. 60(B) may be used in original actions in the courts of appeals, the Ohio Supreme Court has held that "Civ.R. 60(B) is clearly inapplicable to review the court's judgment on appeal." *Martin v. Roeder* (1996), 75 Ohio St.3d 603.

The Supreme Court has held for many years that the civil rules generally do not apply to appeals. "Under ordinary circumstances, neither the Ohio Rules of Criminal Procedure nor the Ohio Rules of Civil Procedure are applicable to cases on appeal; the Appellate Rules 'govern procedure in appeals to courts of appeals from the trial courts of record in Ohio.'" *State v. McGettrick* (1987), 31 Ohio St.3d 138, 141, fn. 5, citing App.R. 1, Crim.R. 1(C)(1), and Civ.R. 1(C)(1).

App.R. 1(A) provides that the appellate rules govern procedure in appeals to the courts of appeals. Civ.R. 1(C) further provides that the civil rules do not apply upon appeal "to the extent by their nature they would be clearly inapplicable." Because App.R. 26 provides for an application for reconsideration from an appellate decision, the *Martin* court concluded that it provided the exclusive remedy for the losing party on appeal and that Civ.R. 60(B) was inapplicable. Id.

This appellate panel cannot ignore the clear precedent of the Ohio Supreme Court. We have no authority to address the merits of Telxon and Dupre's

motion for relief from judgment pursuant to Civ.R. 60(B). The motion for relief from judgment is overruled accordingly.

Appellee Dupre has also requested leave to file an untimely application for reconsideration of this court's September 25, 2005 judgment. The justification for granting leave, and for considering reconsideration on its merits, is the belief that extraordinary circumstances have been alleged—thus permitting the application for an untimely motion under Appellate Rule 14(B). See, e.g., *Carroll v. Feiel* (1981), 1 Ohio App. 3d 145.

However, even if this court were to consider an Appellate Rule 26(A) reconsideration on its merits, the standard for the ultimate ruling is different from an ab initio examination of the appeal on the merits. The test is whether the application raises an obvious error in the court's original decision or raises an issue that was either not considered at all or not fully considered in the original opinion. *State v. Black* (1991), 78 Ohio App.3d 130, 132; *Columbus v. Hodge* (1987), 37 Ohio App.3d 68, 68. An application for reconsideration is not an opportunity to reargue the merits of a party's case; rather, the party moving for reconsideration bears the burden of pointing to the alleged deficiencies in the appellate court's earlier decision. See *State v. Vrabel* (Oct. 6, 2000), 7th Dist. No. 95 CA 221. These limitations on the breadth of such reconsideration may well be the reason why appellee Telxon did not even join in the request for leave. Furthermore, we do not have the authority to disqualify a judge for an alleged violation of an appearance standard. That authority rests with the Chief Justice under the Ohio

Constitution. See Section 5(C), Article IV, Ohio Constitution.

But, even if an untimely application for reconsideration were procedurally available, the mere granting of leave to file an untimely motion would not, in itself, set aside the existing judgment. Although Appellee Dupre has maintained that extraordinary circumstances exist to justify granting leave to file an untimely application, he has failed to allege that he could demonstrate any legal deficiency in the appellate judgment if leave were granted. Accordingly, the request to file an untimely application for reconsideration is denied.

NADER, J.
DISSENTS, SAYING:

The Supreme Court of Ohio has identified the purpose of Civ.R.60(B) as "affording relief in the interest of justice." *Moore v. Emmanuel Family Training Center, Inc.* (1985), 18 Ohio St.3d 64, 67, fn.1. The Court has also declared, on multiple occasions that "Civ.R. 60(B) is a remedial rule that is to be liberally construed with a view for effecting a just result." *State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. Of Elections (1993)*, 67 Ohio St.3d 134, 136; see, also, *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 21; *Blasco v. Mislik* (1982), 69 Ohio St.2d 684, 685. The basic authorization for using the rule is found in its first sentence: "On motion and *upon such terms as are just,* the court may relieve a party or his legal representative from a final judgment, order or proceeding***." (Emphasis added).Civ.R. 60(B). For the reasons that follow, I believe the

underlying motion is properly before this court and the terms of the motion demonstrate relief is necessary for a fair and equitable resolution of the underlying matter. In short, I would hold the motion should be granted to avoid the appearance of impropriety.

Initially, I acknowledge that the rules of civil procedure generally have no application to procedure in courts of appeals. "The Rules of Appellate procedure govern appeals from trial courts of record to courts of appeals in Ohio." *Martin v. Roeder,* 75 Ohio St.3d 603, 1996-Ohio-451. Not coincidentally, Telxon points out that *Martin* stands for the proposition that Civ.R. 60(B) is clearly inapplicable to review a final judgment of the court of appeals. Id. Telxon's assertion is generally accurate; however the holding in *Martin* cannot be read in a vacuum. A review of the basic facts and circumstances of *Martin*, in conjunction with a careful application of established rules of interpretation, demonstrates its ruling is not as sweeping as Telxon proposes.

In *Martin*, the appellant, a pro se inmate, filed a complaint in the Marion County Court of Common Pleas against the appellee, Marion Correctional Institution, alleging violations under Section 1983. Summary judgment was rendered in appellee's favor. The Third District Court of Appeals affirmed the holding.

Later, the appellant filed a motion for relief from the appellate court's judgment pursuant to Civ.R. 60 (B). The Court of Appeals overruled the appellant's motion holding that Civ.R. 60 (B) was inapplicable to appellate proceedings.

In affirming the Third District's determination, the Supreme Court held, per curiam, that Civ.R. 60 (B) is outside the scope of appellate proceedings. The Court pointed out that the rules of appellate procedure, in particular a motion for reconsideration pursuant to App.R. 26(A), are the only recourse from a judgment rendered by an appellate court on appeal.

S.Ct.R.Rep.Op. 1(B)(1) provides that, "[t]he law stated in a Supreme Court opinion is contained within its syllabus (if one is provided), and its text, including its footnotes." *Martin* was an opinion rendered per curiam, i.e. "by a majority of the court(,)" S.Ct.R.Rep.Op. 1(B)(3), but, contains no syllabus. Accordingly, the text of *Martin* sets forth the Supreme Court's specific holding.

Upon careful review of the text, the holding in *Martin* is narrow, limited to facts where an appellant, pursuant to Civ.R. 60 (B), attempts to seek relief from the judgment of an appellate court deciding an appeal from the judgment of a trial court. The factual and legal scenario adjudicated by the court in *Martin* is therefore fundamentally distinguishable from the issue presented in the matter sub judice.

Here, it is clear that we are considering a motion which does not address the merits of the appellate court's judgment relating to the direct appeal but, to the impropriety of a judge (or judges) sitting on the appeal. The issues animating appellees' motion emanate from facts, unrelated to the appeal but directed to disqualification of a judge, discovered subsequently to all substantive or procedural matters addressed by the trial court and, obviously, not

included in the record; the direct appeal in this matter was heard and concluded. The issues raised in appellees' motion are not part of the appeal from the trial court and not exclusively subject to appellate rules.

The motion under consideration does not address the trial court's judgment on appeal or the appellate judgment on that appeal; nor does it ask the Supreme Court to disqualify the judges per R.C. 2701.03, an action exclusively within the authority of the Chief Justice. This motion challenges the Ninth District's ruling on constitutional and ethical grounds as an "error or omission" of the Court of Appeals in violation of Canons 3 and 4 of the Code of Judicial Conduct:

> Canon 3(E)(1) provides "A judge shall disqualify himself*** in a proceeding in which the judge's impartiality might reasonably be questioned. ***" and,
> Canon 4:
> "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."

The Fourteenth Amendment to the Constitution of the United States affords all residents due process to "give them equal protection of the laws and the right to have their case fairly tried in a public tribunal." *In re Oliver* (1948), 333 U.S. 257. In *In re Murchison* (1955), 349 U.S.133, the United States Supreme Court, in an opinion by Justice Black, stated:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course,

> requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge. . . not to hold the balance, nice, clear and true between the State and the accused denies the latter due process of law.'" Id. At 136, quoting *Tumey v. Ohio*, 273 U. S.510, 532.

Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But, to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States* (1954), 348 U.S. 11, 14." *In re Murchison,* supra.

Rule 1 of the Local Rules of the Ninth Appellate District sets forth "***on appeal when the Ohio Rules of Appellate Procedure or these local rules cannot be applied, the Ohio Rules of Civil Procedure will apply, unless they are clearly inapplicable." eff. 7-1-98. With this in mind, the Supreme Court of Ohio has observed "[a] judge's participation in a case which gives rise to the appearance of impropriety and possible bias could constitute grounds for relief from judgment under Civ.R. 60 (B)(5)." *Volodkevich v. Volodkevich* (1988), 35 Ohio St. 3d.152, 154.

Civ.R. 60 (B) reads in relevant part: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons***

"(5) any other reason, justifying relief from the judgment."

In *State ex rel. Gyurscsik v. Angelotta,* (1977) 50 Ohio St.2d 345, 346, the Ohio Supreme Court, in a per curiam opinion, pointed out that Civ.R.60(b)(5)" *** "is characterized ***as reflecting the inherent power of the court to relieve a person from the unjust operation of a judgment" and "[i]t is generally held that court errors and omissions are reasons justifying relief under the 'other reason' clause." Id. at 346-347.

In *Klapprott v. United States,* (1949) 335 U.S. 601, 614, modified, 336 U.S. 942, Justice Black pointed out that Civ.R.60(B)(5) "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

In the motion before this court, appellees detailed the following undenied allegations supported by documentary exhibits:

(1) Robert Meyerson	(a) was Chairman and CEO of Telxon, located in Fairlawn, Ohio;

(b) is a substantial shareholder in Symbol; and,

(c) is an important witness in the trial.

In 1996, the Meyerson family contributed a total of $15,000.00 to Judge Batchelder in his campaign for the Ohio House of Representatives, 30% of his total post-primary contributions that year.

(2) During the pendency of the underlying case (December of 1998 through September 21, 2005), the Meyersons contributed nearly $1,000,000.00 to the Summit County Republican Party, including its Judicial Fund.

(3) In 2000, the year Judge Batchelder was seeking election to this court, the Meyersons wrote $460,000.00 dollars in checks to the Summit County Republican Party, at one fund raiser, benefitting both its General Fund and its Judicial Fund. Further, in 2000, Mr. Meyerson, with his wife, were the 12th highest contributors to state Republican Party organizations nationally. The Meyersons had personally contributed $290,000.00 to the Ohio and Florida Republican Parties.

(4) $25,000.00 of the Meyersons' total contributions to the Summit County Judicial Fund, in 2004, was given at the annual Summit County Republican fund raiser, within weeks after the appellate oral arguments in the underlying matter.

(5) The Meyersons have historically provided significant campaign contributions to may elected political officials including former Governor Taft, who first appointed Judge Batchelder to the Ninth Appellate District, and President Bush, who makes federal judicial appointments.

The alleged "error or omission" raised in appellee's motion is Judge Batchelder's failure to comply with Canon 3 and Canon 4 of the Code of Judicial Conduct. "[C]anons and accompanying text 'establish mandatory standards unless otherwise indicated.'" *Volodkevich, supra*, at 154, quoting the preface to the Code of Judicial Conduct. Although this motion only includes the writing judge, it also applies to the entire panel. The "Code" is binding, the facts compulsory, and the Canons mandatory. At the very minimum, disclosure to the parties of Meyerson's impressive political contributions and their potential for the appearance of impropriety was an absolute ethical mandate within the principles of Canons 3 and 4.

"The proper test for determining whether a judge's participation in a case presents an appearance of impropriety is * * * an objective one. A judge should step aside or be removed if a reasonable and objective observer would harbor serious doubts about the judge's impartiality." *In re Disqualification of Lewis,* 105 Ohio St.3d 1239, 2004-Ohio-7359, ¶8, citing Canon 3 (E) (1) of the Code of Judicial Conduct.

The previously undiscovered facts call into question the presumptive neutrality enjoyed by an impartial judge. Accordingly, the instant motion invokes the

original jurisdiction of this court per Article IV, Section 3 (B)(1)(f) of the Ohio Constitution, which provides:

"The courts of appeals shall have original jurisdiction *** (I)n any cause on review as may be necessary to its complete determination."

Appellees have sought this court's review of an issue originating in this court; an issue of which justice demands consideration for purposes of a "complete determination."

Considering the allegations set forth in their motion, I would hold appellees have demonstrated a reasonable appearance of impropriety to the extent the allegations cast doubt upon the impartiality of the judgment rendered by this court in its September 21, 2005 decision. Given the peculiar and extraordinary facts alleged in the motion, our careful attention to appellees' allegations is necessary for a complete and equitable determination of the case. Various opinions by the Chief Justice of the Ohio Supreme Court support such a conclusion.

In *In re Disqualification of Celebrezze,* 105 Ohio St.3d 1241, 2004-Ohio-7360, Chief Justice Moyer disqualified all judges in Cuyahoga County from sitting on a matter where the defendant, in a divorce case, was a county officeholder with "significant personal and professional connections to many judges in the county." Id. At 1242. The Chief Justice acknowledged that Judge Celebrezze testified, via affidavit, that he was prepared to address the matter fairly and impartially. Notwithstanding Judge

Celebrezze's esteemed testimony, the Chief Justice determined:

> "Judge Celebrezze and the other judges of Cuyahoga County should be disqualified from participation in the case. Though none of Judge Celebrezze's words or actions suggest that he is biased or prejudiced, this is a case in which his removal is necessary 'to avoid even an appearance of bias, prejudice, or impropriety, and to ensure the parties, their counsel, and the public the unquestioned neutrality of an impartial judge.' *In re Disqualification of Floyd,* 101 Ohio St.3d 1215, 2003-Ohio-7354, at ¶10. As this court first said more than seven decades ago, 'it is of vital importance that the litigant believe that he will have a fair trial.' *State ex. rel. Turner v. Marshall* (1931), 123 Ohio St. 586, 587. The participation in this case by any Cuyahoga judge might reasonably cause the parties and the public to question the fairness of the proceedings." *In re Disqualification of Celebreeze*, supra, at ¶4.

As a result of the concerns for the appearance of impropriety prohibited by Canon 4, the Chief Justice resolved to appoint a visiting judge from outside Cuyahoga County to hear the matter.

Moreover, in a similar matter, the Chief Justice again underscored the importance of avoiding even the appearance of impropriety and the neutrality of the judiciary: "Those same concerns [animating the decision in *In re Disqualification of Celebreeze*] underlie my decision in this case. No one has

suggested that Judge Corrigan has said or done anything reflecting bias or prejudice for or against any of the parties to this case. Nonetheless, plaintiff Hagan is a county commissioner who necessarily exercises considerable authority over the budget of the common pleas court in Cuyahoga County. The public could reasonably question whether any judge now serving on the court of common pleas in Cuyahoga County would be able to render a decision based solely on the relevant facts and the law applicable to those facts." *In re Disqualifications of Corrigan,* 110 Ohio St.3d 1217, 2005-Ohio-7153, at ¶6.

One can debate both sides of the proper use of the Civil Rules by distinguishing cases and the uses of Civ.R. 60 (B)(5). However, Civ.R. 60(B)(5) is remedial in nature and therefore should be used to achieve equitable and just results. As the underlying vehicle is in original motion, this court is empowered to use this remedial rule to assure justice. Failing to do so merely supports a simplistic and strained rigidity in the employment of the civil rules towards the end of validating a judgment from a judge and panel who clearly and without hesitation should have complied with the mandatory dictates of Canon 3 and Canon 4 and disqualified themselves, sua sponte, as the entire court subsequently did, due to the overwhelming appearance of impropriety that could be drawn by a reasonable person.

A $212,000,000.00 plus judgment erased on appeal by a panel whose local political party received approximately $1,000,000.00 in contributions from a very financially interested individual since the inception of the case, creates a classic scenario giving

rise to every nuance of political influence in our courts which calls for self-disqualification. Meyerson and his associated entities contributed vast amounts of money for years to persons directly associated with this action and every local, state, and national office holder with authority and position to affect judicial careers of those serving in the Ninth District. This must suggest to a reasonable and objective observer a greater test of the integrity of the court than potential favoritism to another county employee. This most assuredly falls within the commendable purpose of Chief Justice Moyer's disqualification of every judge in Cuyahoga County to prevent the appearance of impropriety and restore confidence in an independent judiciary.

One can only surmise another's ultimate intentions, for that knowledge is privy to that person alone. No suggestion or conclusion is proffered herein about the impropriety of any of the parties involved. To the contrary, the presumption of their propriety has not been compromised by actual evidence of bias; however, the multitude of factors present in this proceeding by which the judge's (judges') impartiality might reasonably be questioned are so strongly supportive of the appearance of impropriety they challenge Canons 3 and 4 and mandate self-disqualification lest appellate nullification joins jury nullification to avoid the effectiveness of our duly enacted laws.

Given the totality of the circumstances and unusual context of the underlying motion, recognition that the Supreme Court has not formally barred the use of a Civ.R. 60(B) motion under these circumstances, and past rulings of the Chief Justice pertaining to disqualification of active and retired judges, I would

hold appellees' motion to be well taken, set aside the judgment, and order a rehearing of the appeal.